# WALLEY METAL WORKS SDN BHD v. SAFETY DEVELOPMENT CORPORATION SDN BHD; PEGAWAI PENERIMA (APPLICANT) & LER CHENG CHYE (LIQUIDATOR)

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[COMPANIES (WINDING UP) NO: D7-28-961-2002]
7 JANUARY 2015

***COMPANY LAW:*** *Winding-up – Liquidators – Imposition of fees against owners of condominium – Whether liquidator could impose fees as remuneration – Whether liquidator's action subject to control of court – Whether fees reasonable – Whether action protected resources of wound up company – Companies Act 1965, ss. 232, 236(3), 237(4), 287(1) – Companies (Winding-up) Rules 1972, r. 142, Second Schedule Table C*

***EVIDENCE:*** *Affidavit – Admissibility of – Affidavit by liquidator not in Bahasa Malaysia – Whether ought to be expunged – Whether winding-up proceedings may be filed in English – National Language Act 1963/1967, s. 8 – Rules of Court 2012, O. 92 r. 1(1)*

The respondent was the developer of a condominium project. The official receiver ('OR') became the provisional liquidator upon the respondent being wound up and subsequently, with a court order, the liquidator took over the administration of the respondent from the OR. The OR, whilst administering the respondent, had obtained strata titles to the condominium and handed it over to the liquidator together with the list of the residents' addresses. The liquidator subsequently charged 2% of the purchase price of each unit of the condominium on all purchasers as verification or confirmation fees in order to execute the strata titles. However, the condominium owners' society ('the society') objected to the imposition of the fees by the liquidator and thus complained on the matter to the OR. The OR, acting on the complaint, challenged the imposition of the fees. The issues raised for the court's determination were: (i) whether the OR had satisfied the condition in the statutory provision to make the applications; (ii) whether the court was granted discretion to act in whatever manner on the complaint; (iii) whether the liquidator could impose the fees as remuneration under s. 232 of the Companies Act 1965 ('the CA'), r. 142 or Second Schedule Table C of the Companies (Winding-up) Rules 1972 ('CWR'); (iv) whether the liquidator's action was still subject to the control of the court as stipulated in s. 236(3) of the CA; (v) whether the liquidator was subject to the direction of the OR in incurring expenses unless there was sufficient fund as noted by s. 287(1) of the CA; (vi) whether the OR was at liberty pursuant to s. 229(1) of the CA to receive the complaint of the society; (vii) whether the liquidator could exercise his discretion in respect of the collection of fees; (viii) whether the purchasers being imposed with the fees should appeal; (ix) whether part of the affidavit of the liquidator concerning the complaint from the society and

the matter arising thereof should not be taken into account and should be struck off pursuant to O. 41 r. 6 of the Rules of Court 2012 ('ROC'); and (x) whether the liquidator's affidavit ought to be expunged as it is not in Bahasa Malaysia as required by O. 92 r. 1(1) of the ROC and s. 8 of the National Language Act 1963/1967.

**Held (dismissing application of official receiver):**

**(1)** There was no doubt that the OR relied on s. 277 of the CA and the relevant limb was sub-s. (2). There was not an iota of evidence to suggest the OR had proven that 'the liquidator did not faithfully perform his duties' and therefore it was unnecessary to find whether the second condition of proving that 'the liquidator did not observe the prescribed requirements or the requirements of the courts' was satisfied. The society was neither the creditor nor contributory of the respondent and therefore, the OR had failed to prove that the complaint must come from 'any creditor or contributory'. However, the OR had fulfilled the condition that the OR himself was making a complaint. (paras 34, 37, 39, 40, 42 & 43)

**(2)** Even though the OR had satisfied one of the conditions in invoking s. 277(2) of the CA, the court has the full discretion to take whatever action it deemed fit in respect of the OR's complaint. (para 46)

**(3)** Section 232 of the CA does not operate where the liquidator is not expecting to be paid out of the properties or assets of the company in liquidation. The liquidator herein had come up with a method of being paid his remuneration, not from the properties and assets of the respondent, but through the fees charged. As such, the OR was wrong to argue that s. 232, especially sub-s. (3) of the CA was operative against the liquidator, more so, when the OR did not dispute that the respondent was without fund. (paras 51 & 52)

**(4)** As there was no committee of inspection appointed, sub-ss. (1) and (2) of r. 142 did not apply to the liquidator. However, sub-s. (3) is relevant and is subjected to the words 'unless the court shall otherwise order' which clearly indicates that the liquidator's remuneration is still subject to the court's order. By virtue of the provision the court could well decide that the fees collected indeed could be the remuneration of the liquidator. Therefore the OR was in error to submit that r. 142 of the CWR did not allow for the remuneration of the liquidator. (para 57)

**(5)** The liquidator could not rely on the Second Schedule Table C of the CWR alone to support his remuneration as it is only applicable where the OR acts as the provisional liquidator or liquidator and it gives the scale upon which remuneration could be given if the OR so acts. However, what is sought by the liquidator was merely to illustrate that the fees charged is reasonable, having in mind that the verification fee

of 2% of the original purchase price of property would be much lower than the time cost basis. Hence, the 2% charged was indeed reasonable and not exorbitant. (paras 59 & 60)

**(6)** Following strictly the wordings of s. 236(3) of the CA, only the creditor or contributory and no other named as parties that may apply to court for such control of a liquidator's powers. It meant that the OR or the society that lodged complaint was not at liberty to request for the control of the powers of the liquidator by the court. As a consequence the OR was wrong to argue that this court could control the powers of the present liquidator by virtue of the provision. (para 62)

**(7)** Section 287(1) of the CA is enacted so that the liquidator will not further erode and deplete the resources of the wound up companies. The liquidator's action did not infringe the provision as the collection of the fees was against the purchasers of the units of the condominiums *ie*, it was against the outsiders and the action protected the resources of the respondent from unwanted use. It also would not in any manner affect the resources of the companies further. (paras 64, 66 & 67)

**(8)** The submission of the OR that he was at liberty to receive the complaint of the society pursuant to s. 229(1) was wrong as the provision clearly indicates that the complaint must come from the creditor and contributory. There was no dispute that the society was not a creditor or contributory of the respondent and therefore the argument of the OR that he could receive the complaint of the society could not be accepted. (paras 68 & 69)

**(9)** Pursuant to s. 237(4) of the CA the liquidator is given discretion to manage the affairs and property of the company and distribute the assets of the same. The purchasers who had been imposed with the fees did not appeal and should therefore not be allowed to be heard in respect of the imposition of the fees. Further, there was no merit to strike out part of the affidavit of the liquidator as it relates to the facts pertaining to the OR receiving complaint from the society regarding the imposition of the fees and was thus relevant to the issue before the court. (paras 71, 74, 75, 76, 78)

**(10)** Although it has been statutorily provided that the affidavit should be in Bahasa Malaysia, the submission on this issue borders on triviality and would not negate the importance of deciding the crux of the matter which was whether the fees could be collected by the liquidator. Further, by virtue of s. 372(d) of the CA and s. 16 of the Courts of Judicature Act 1964, rules specifically for winding-up of companies can be made as in CWR. There was also a Circular No. 5 issued by Jabatan Kehakiman Malaysia which clarifies that winding-up proceedings may be filed in English until such time as an authoritative Bahasa Malaysia

version is gazetted. Therefore, the liquidator's affidavit although in English cannot be struck out because the CWR have been gazetted in English. (paras 82-84)

**Case(s) referred to:**
*Citibank Bhd v. Malwira Manufacturing Sdn Bhd [2012] 3 CLJ 81 HC* ***(refd)***
*Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA* ***(refd)***
*Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd [2006] 3 CLJ 592 HC* ***(refd)***
*Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 227, 229(1), 232(2), (3), 236(3), 237(3), (4), 277(1), (2), (3), 279, 287(1), 372(d)
Companies (Winding-Up) Rules 1972, Second Schedule Table C, r. 142(3)
Courts of Judicature Act 1964, s. 16
National Language Act 1963/67, s. 8
Rules of Court 2012, O. 1 r. 2(2), O. 41 r. 6, O. 92 r. 1(1)

*For the official receiver - Nik Syahril Nik Abdul Rahman; AG's Chambers*
*For the liquidator - Izabella de Silva; M/s Iza Ng Yeoh & Kit*

*Reported by S Barathi*

## JUDGMENT

**Abu Bakar Jais JC:**

### Introduction

**[1]** At the outset as introduction it is explained that this is a case where the official receiver ('OR') acting on the complaint it received, questioned the action of the liquidator in imposing certain fees on the purchasers of a condominium where the developer of the same is the respondent, the wound up company. The liquidator on the other hand disputes whether the OR has fulfilled the statutory provision it is relying on to move this court to review the action of the liquidator. In addition, in any event the liquidator asserts he is entitled to impose the impugned fees.

### Background Facts

**[2]** The wound up company, the respondent herein is the developer of a condominium project, called Heritage Condominium. The OR was the provisional liquidator for the respondent upon its winding up. Subsequently by a court order the current liquidator took over the administration of the respondent from the OR.

**[3]** OR in administering the respondent had obtained strata titles to the condominium and had handed over the same to the liquidator together with the list of resident addresses made available partly through the assistance of Heritage Condominium Owners' Society ('Society').

**[4]** The liquidator subsequently charged 2% of the purchase price of each unit of the condominium on all purchasers as verification or confirmation fees in order to execute the strata titles. The liquidator says these fees are needed to verify the true beneficial ownership as against persons claiming to be purchasers of the condominium units.

**[5]** The Society objected to the imposition of these fees by the liquidator and thus took it up to complain on the matter to the OR. The OR agrees with the Society and therefore is before this court challenging the liquidator's imposition of the fees.

**OR's Applications**

**[6]** Based on the background facts, the applications by the OR before this court are:

(a) Decision of the court that the verification fee of 2% of the purchase price of the property that is charged and collected by the respondent from the purchasers to verify the ownership of title is invalid having been made not in accordance with provisions of laws;

(b) Decision of the court that the respondent's demand and collection of verification fee of 2% of the purchase price of the property from the purchasers of units in Heritage Condominium constitutes an offence because it is not in accordance with provisions of laws;

(c) Decision of the court that respondent refunds the verification fee that has been collected from every purchaser of Heritage Condominium; and

(d) Any other directions as this Honourable Court may think just, fair and expedient.

**OR's Arguments**

**[7]** The gist of the OR's submissions in support of the applications is as follows.

**[8]** The liquidator cannot impose the fees as s. 232 of the Companies Act 1965 ("CA") does not provide for such collection as remuneration for the liquidator. The provisions of r. 142 and Second Schedule Table C of the Companies (Winding-Up) Rules 1972 ('CWR') also do not indicate the liquidator can collect such fees. None of the conditions stipulated in s. 232 of the CA have been fulfilled by the liquidator for the collection of such fees. Likewise the liquidator could not resort to r. 142(3) of the CWR and Second Schedule Table C of the same as these do not apply for the liquidator.

**[9]** The liquidator has not shown that his reliance on r. 142(3) and Second Schedule Table C of the CWR is justified as the liquidator is not appointed together with the committee of inspection ('COI') and there is no order of the court and no property to be realised for the fees to be charged.

**[10]** Second Schedule Table C of the CWR is only applicable to the OR and not the liquidator. A

**[11]** The liquidator had failed to rebut the assertion that his action in handing over the strata titles to the purchasers and confirming who actually are the purchasers are not related to realisation of the assets or properties of the respondent. Neither is it related to distribution of the same. B

**[12]** There is nothing in the affidavit of the liquidator to indicate the same can impose such collection of fees as remuneration.

**[13]** The liquidator's action is still subject to the control of the court as stipulated in s. 236(3) of the CA. C

**[14]** The liquidator is also still subject to the direction of the OR in incurring expenses unless there is sufficient fund as noted by s. 287(1) of the CA.

**[15]** The OR is at liberty pursuant to s. 229(1) of the CA to receive the complaint of the Society that the fees should not be charged. D

**[16]** Part of the affidavit of the liquidator concerning the complaint from the Society and matters arising thereof should not be taken into account and should be struck off pursuant to O. 41 r. 6 of the Rules of Court 2012 ('RC') as this is irrelevant because it does not explain whether the liquidator can E impose such fees as remuneration in view of the statutory provisions as indicated.

**[17]** The liquidator's affidavit ought to be expunged as it is not in Bahasa Malaysia as required by O. 92 r. 1(1) of the RC and s. 8 of the National Language Acts 1963/67. F

**Liquidator's Arguments**

**[18]** The summary of the liquidator's contentions in resisting the OR is narrated below.

**[19]** As the application by the OR is filed pursuant to s. 227 of the CA, the G OR has a duty to show it has satisfied the requirement of that provision. In this regard the OR must show that the action of the liquidator to claim for the fees amounts to a failure to perform the liquidator's duty. There is also a need for the OR to show the conduct of the liquidator in requesting the fees amounts to misfeasance, neglect or omission, resulting in the respondent H sustaining a loss and the respondent must make good for the loss.

**[20]** There is a need for the OR to establish a *prima facie* case that something must be investigated before s. 277(2) of the CA could be operative.

**[21]** The liquidator is entitled to remuneration and reimbursement of costs I and expenses incurred in the administration of the respondent. The remuneration is to be paid out of the assets.

A **[22]** The respondent has not divested itself of beneficial interest and the liquidator has a duty to examine the claims from the purchasers to determine whether proof has been produced that full purchase price has been paid for the transfer to be executed or whether the units in fact belong to the respondent.

B **[23]** As there is no available funds in the respondent to pay for the verification cost, it is legitimate for the liquidator to request those claiming the trust assets to pay for the verification.

**[24]** The payment for verification fees to the liquidator does not require prior application under s. 232(2) of the CA because this provision is with C respect to remuneration paid out of the respondent and not where there is private arrangement such as now between the liquidator and the purchasers, not affecting the assets of the respondent.

**[25]** In any event acting reasonably, the liquidator ought to be indemnified D out of the trust assets for various costs and expenses.

**[26]** This court could ratify the verification fees imposed. The purchasers paying the fees had an agreement with the liquidator to carry out the work. In respect of claims not yet verified, this court's authorisation to levy the fees will render future applications for the same unnecessary. Therefore the fees E already paid need not be returned as those who had paid have not requested the same to be refunded.

**[27]** The liquidator has an equitable lien for the fees collected as the verification work has been completed.

F **[28]** There is no necessity to apply to court for directions pursuant to s. 237(3) of the CA as the liquidator had acted pursuant to his discretion in accordance with s. 237(4) of the CA as there were no funds available and the fees imposed is necessary for further work to be done.

**[29]** The verification fee of 2% of the original purchase price of the units G of condominium would be much lower than the time cost basis. This was after all based on the lowest of the scale on Second Schedule Table C of the CWR.

**[30]** None of the purchasers had applied to court to challenge the imposition of the fees. Instead the Society had complained to OR and in this H regard the former is not a creditor or contributory and therefore has no *locus* in complaining.

**[31]** On the submission of the OR that the affidavit used by the liquidator ought not to be taken into account, the liquidator submits that the matters raised in the affidavit are relevant. It relates to facts pertaining to the OR I receiving complaints from the Society regarding the imposition of the fees. There is no merits for striking out parts of the affidavit of the liquidator as it is not proven that these are irrelevant.

**[32]** On the affidavit filed in English, the OR is wrong to submit that the liquidator cannot be allowed to use such affidavit. The provisions of the RC and the CWR allow for the using of the affidavit in English.

**Court's Findings**

**[33]** For the sake of convenience, in addressing the decision that ought to be made pertaining to the applications, I shall narrate only the relevant issues as highlighted in the sub-heading below.

*Whether The OR Has Satisfied The Conditions In The Statutory Provision To Make The Applications*

**[34]** First there is no doubt the OR is invoking s. 277 of the CA in requesting this court to grant the applications sought. The OR as argued wants this court to make the orders as prayed because such orders can be founded on the said statutory provisions. As the OR is relying on this provision, I agree that the OR must as contended by the liquidator, satisfy this court that indeed he can resort to s. 277 of the CA for the applications filed. If the OR is unable to do so, it is axiomatic that his applications should not see the light of day.

**[35]** It is pertinent to note that although s. 277 of the CA contains several limbs, the OR has not stated under which limbs is the same acting to move this court for the applications. It is appropriate to note the whole of the said provision is stated as;

> (1) Every liquidator shall keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings and of such other matters as are prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect them.
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> (2) The Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.
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> (3) The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit.
>
> (4) The Court may at any time require any liquidator to answer any inquiry in relation to the winding up and may examine him or any other person on oath concerning the winding up and may direct an investigation to be made of the books and vouchers of the liquidator.

A (5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator or provisional liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is *prima facie* entitled.

B **[36]** In the context of the applications filed, sub-s. (1) of s. 277 of the CA as narrated is not relevant to be addressed here.

**[37]** The relevant limb of the whole section that calls for consideration is sub-s. (2) as seen above. What are the conditions of this subsection? There are several conditions. Looking at the provision itself, it is most convenient C to break up these conditions as follows:

(a) … if a liquidator does not faithfully perform his duties **and** observe the prescribed requirements or the requirements of the Courts …;

(b) …or if any complaint is made to the Court by **any creditor or contributory …**;

D

(c) … or by the Official Receiver in regard thereto.

(emphasis added)

**[38]** I shall now address the condition in (a) as above. There can be no dispute and it is crystal clear the condition in (a) contains the all important E word 'and'. It is also basic to appreciate the word 'and' under normal statutory interpretation means conjunctive. It means both situations or matters arising before and after the word 'and' must be fulfilled. There are numerous case law on the same proposition but suffice for me to cite one which is not highlighted by both parties to these applications as both parties F in the present case had not addressed this issue. This is the Court of Appeal's case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 4 MLJ 360 which states:

> The word 'and', between the word 'promptly' and the words 'in any event within 40 days' in its plain and ordinary meaning clearly is not disjunctive G but conjunctive.

**[39]** In this regard it therefore necessary for the OR to prove:

(i) The liquidator does not faithfully perform his duties and

(ii) The liquidator does not observe the prescribed requirements or the H requirements of the courts.

**[40]** Suffice for me to say in the present case there is not an *iota* of evidence to suggest the OR has proven 'the liquidator does not faithfully perform his duties'. There is in fact no suggestion or assertion by the OR that indeed this is the case. This is rightly so as it would not be easy for the OR to discharge I the heavy burden of proving not only the liquidator does not perform his duties but the liquidator does not faithfully perform his duties. Therefore it is unnecessary to find whether the second condition of proving that 'the

liquidator does not observe the prescribed requirements or the requirements of the courts' has been proven by the OR because both conditions must be proven and not just one.

**[41]** Therefore the condition as narrated in (a) above has not been fulfilled by the OR.

**[42]** I shall now turn to the condition in (b) above. In (b) again there is no doubt the complaint must come from 'any creditor or contributory'. In this regard there is no dispute that the Society is neither the creditor nor contributory of the respondent. Therefore again it is clear the OR has not been able to prove he has satisfied the condition provided in (b).

**[43]** That brings me to the condition in (c). In (c) above the OR merely needs to satisfy the condition that the OR himself is making a complaint. This is a less onerous task for the OR compared to the two previous conditions in (a) and (b). In this regard I am satisfied that the OR has fulfilled this condition as the OR is before this court complaining the fees imposed by the liquidator is not justified to be collected.

**[44]** Having satisfied the condition in (c) as explained there is no necessity for this court to further dwell on the issue whether the OR needs to satisfy the conditions also in respect of s. 277(3) of the CA as also contended by the liquidator.

*Whether The Court Is Granted Discretion To Act In Whatever Manner On The Complaint*

**[45]** That however is not the end of the matter as the last few words of sub-s. (2) of s. 277 of the CA must also be taken into account. The last few words read;

> '… the Court shall inquire into the matter and **takes such action as it thinks fit**' (emphasis added).

**[46]** It is crystal clear therefore that even though the OR in this case may have satisfied one of the conditions in invoking s. 277(2) of the CA, this court has the full discretion to take whatever action it deems fit in respect of the OR's complaint. This is abundantly obvious considering the extensive words used in the provision allowing full latitude as to what action this court may take in addressing the complaint.

*Whether The Liquidator Can Impose The Fees As Remuneration Under s. 232 Of The CA, r. 142 Or Second Schedule Table C Of The CWR*

**[47]** I shall begin addressing the issue on whether the liquidator can impose the fees as remuneration under s. 232 of the CA by quoting the whole provision itself which reads:

> (1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

(2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

(3) A liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined:

(a) by agreement between the liquidator and the committee of inspection, if any;

(b) failing such agreement or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or

(c) failing a determination in a manner referred to in paragraph (a) or (b), by the Court.

(4) Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(a) the Court may, on the application of a member or members whose shareholding or shareholdings represents or represent in the aggregate not less than ten per centum of the issued capital of the company, confirm or vary the determination.

(5) Where the salary or remuneration of a liquidator is determined in the manner specified in paragraph (3)(b) the Court may, on the application of the liquidator or a member or members referred to in subsection (4), confirm or vary the determination.

(6) Subject to any order of the Court the Official Receiver when acting as a liquidator or provisional liquidator of a company shall be entitled to received such salary or remuneration by way of percentage or otherwise as is prescribed.

(7) If more than one liquidator is appointed by the Court, the Court shall declare whether anything by this Act required or authorized to be done by the liquidator is to be done by all or any one or more of the persons appointed.

(8) Subject to this Act the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

**[48]** For the purpose of addressing the contention of the OR on this issue though, the focus of my attention should be specifically on s. 232(3) of the CA where the OR submits none of the limbs in that subsection is applicable for the liquidator. This is because the liquidator:

(a) Has no agreement with the COI as there was no COI appointed;

(b) Has no resolution supporting his action and

(c) Has no court order regarding the same.

**[49]** On this contention of the OR, first it must be appreciated that the remuneration being explained under s. 232 of the CA must take into account the whole provisions of this section. If one were to look at the whole section, one would realise the scheme of such remuneration is to be paid out of the properties or assets of the company. The monies for the remuneration must come from what is realised from the assets and properties of the same. In the event there is sufficient fund from a wound up company, it would be expected to pay such remuneration but where such company has no available fund left such as the present respondent that remuneration would be impossible to be handed over to a liquidator. And when it comes to companies winding-up, it is common knowledge it both involved companies with or without funds.

**[50]** Second the OR has not rebutted the assertion by the liquidator there is no fund left in the respondent. It is therefore reasonable to assume that the respondent is indeed without further fund to meet the remuneration of the liquidator. How will the work of the liquidator be then paid since there is no fund left? It may be magnanimous to proceed on the basis of labour of love but in reality no one would want to toil with administering a company without being paid. Therefore it would not be reasonable to expect the liquidator to continue administering the respondent despite no fund is available for his work. As the facts of this case indicate, there is still at the very least, the work of handing over the strata titles to the purchasers of the condominium units that needs to be done.

**[51]** Precisely for this reason s. 232 does not operate where the liquidator is not expecting to be paid out of the properties or assets of the company in liquidation as the respondent here. In this present case before this court, the liquidator had come up with a method of being paid his remuneration not from the properties and assets of the respondent but through the fees charged. It will be highlighted later in this judgment that even through this method, the remuneration is not unreasonably exorbitant but suffice to state at this stage, what the liquidator did in respect of imposing the fees illustrates the remuneration is not derived from the properties and assets of the respondent.

**[52]** As the remuneration is not from the properties and assets of the respondent, the OR is with respect wrong to argue that s. 232 of the CA, especially s. 232(3) of the CA is operative against the liquidator. This is especially so when we are reminded that the OR does not dispute the respondent is without fund.

**[53]** In this regard it is also most opportune to address the submission of the OR on the point the liquidator had failed to rebut the assertion that his action in handing over the strata titles to the purchasers and confirming who actually are the purchasers are not related to realisation of the assets or properties of the respondent. Neither is it related to distribution of the same. Precisely because it is not so connected, the liquidator's remuneration is not to be subjected to the operation of s. 232(3) of the CA. As stated and explained earlier, this section only comes to play if there is sufficient fund in the wound up company ie, respondent. Since there is no sufficient fund, there is no issue on the properties and assets of the company being realised.

**[54]** I also need to caution here on the interpretation that I have given regarding the operation of this section. It is pertinent to note that this interpretation will only apply if it is proven that the wound up company is left with no fund. A different interpretation is of course possible and in fact anticipated if such companies are proven to be financially able.

**[55]** I will now deliberate on the issue whether the liquidator's remuneration could be supported by r. 142 or second Schedule table C of the CWR.

**[56]** First the whole of r. 142 of the CWR states:

> (1) The remuneration of a liquidator, unless the Court shall otherwise order, shall be fixed by the committee of inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realized, after deducting the sums (if any) paid to secured creditors (other than debenture holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend.
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> (2) If the Official Receiver is of the opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the Official Receiver may apply to the Court and thereupon the Court shall fix the amount of the remuneration of the liquidator.
>
> (3) If there is no committee of inspection the remuneration of the liquidator shall, **unless the Court shall otherwise order**, be fixed by the scale of fees and percentages for the time being payable on realizations and distributions by the Official Receiver as liquidator.
>
> (4) This rule shall only apply to a liquidator appointed in a winding-up by the Court.
>
> (emphasis added)

**[57]** Sub-ss. (1) and (2) above do not apply to the liquidator as there is no COI appointed. But sub-s. (3) above is relevant and the same is subjected to the words 'unless the court shall otherwise order'. That clearly indicates the liquidator's remuneration is still subject to the court's order. This court by virtue of this provision could well decide that the fees collected indeed could

be the remuneration of the liquidator. Therefore the OR is in error to submit that r. 142 of the CWR does not allow for the remuneration of the liquidator based on the facts of this case.

**[58]** I now turn to the issue whether Second Schedule Table C of the CWR could be used to support the liquidator's remuneration. The said Table C is only applicable where the OR acts as the provisional liquidator or liquidator and it gives the scale upon which remuneration could be given if the OR so acts.

**[59]** I therefore is in agreement with the OR that strictly by the said Table alone, the liquidator cannot rely on the same to support his remuneration.

**[60]** However what is sought by the liquidator is merely to illustrate that the fees charged is reasonable having in mind that the verification fee of 2% of the original purchase price of property would be much lower than the time cost basis. This was after all based on the lowest of the scale on Second Schedule Table C of the CWR. Hence what the liquidator has done is not to show that the said Table C supports it remuneration but only to demonstrate the fees is reasonable having regard to the said Table. It also affords me the opportunity to state that the 2% charged is indeed reasonable and not exorbitant. A time cost basis would mean a much higher fees instead being imposed on the purchasers.

*Whether The Liquidator's Action Is Still Subject To The Control Of The Court As Stipulated In s. 236(3) Of The CA*

**[61]** I shall now deliberate on the issue whether the liquidator's action in imposing the fees is still subject to the scrutiny of the court as contended by the OR. In this regard the OR says the provision of s. 236 of the CA is relevant especially sub-s. (3) of the same. The whole s. 236 of the CA states;

> (1) The liquidator may with the authority either of the Court or of the committee of inspection:
>
> (a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;
>
> (b) subject to section 292 pay any class of creditors in full;
>
> (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;
>
> (d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a

A contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

B (e) appoint an advocate to assist him in his duties.

(2) The liquidator may:

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

C (b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

(c) sell the immovable and movable property and things in action
D of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that
E purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate
F creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

G (g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or
H debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

I (i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, **and** any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (emphasis added)

**[62]** Section 236(3) of the CA as narrated above and referred by the OR clearly indicates a liquidator's powers conferred by s. 236 of the CA as a whole is subjected to the control of the court. However s. 236(3) of the CA as can be seen, also used the word 'and' in respect of the control to be undertaken by the court. In this regard the word 'and' is used to note that although the power of the liquidator is subject to the scrutiny of the court, that exercise of control can be undertaken only at the request of the creditor or contributory of the wound up company. This is rightly so because the creditor or the contributory are the ones most affected by the action of a liquidator. I have already elaborated the word 'and' means it is conjunctive and not disjunctive earlier when I dealt with the provision of s. 277(2) of the CA. In any event following strictly the wordings of s. 236(3) of the CA, only the creditor or contributory and no others is named as parties that may apply to court for such control of a liquidator's powers. It therefore means in the present case, the OR or the Society that lodged the complaint is not at liberty to request for the control of the powers of the liquidator by the court. As a consequence the OR with respect is wrong to argue this court could control the powers of the present liquidator by virtue of this provision.

*Whether The Liquidator Is Subject To The Direction Of The OR In Incurring Expenses Unless There Is Sufficient Fund As Noted By s. 287(1) Of The CA*

**[63]** The OR says the liquidator must get the OR's approval in order to incur expenses unless there are sufficient fund as provided by s. 287(1) of the CA which states:

Unless expressly directed to do so by the Official Receiver, a liquidator shall not be liable to incur any expense in relation to the winding up of a company unless there are sufficient available assets.

**[64]** The purpose and intent of the provision must first be understood. It is enacted so that the liquidator will not further erode and deplete the resources of the wound up companies. It is to protect the companies so as to allow for the maximum distribution to all rightful stakeholders including the creditors. Simply put, if there is less fund, then the distribution of a wound up company will likewise be lessen. To avoid the impact of that consequence, that is the reason the OR is given a hand in checking the action of the liquidator of a company.

**[65]** On this note, in interpreting a provision of a statute the purpose of the same ought to be considered and I am supported on this proposition by the Federal Court in the case of *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1; [2010] 2 MLJ 155 where it states:

A This raises the question of whether the meaning of the word 'upgrading' in s. 13 of the Act is capable of being restricted in order to avoid the hardship. That brings into focus s. 17A of the Interpretation Acts 1948 and 1967 ('s. 17A') which reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

B

**[66]** Having explained the rational of the provision and the duty to take note of the purpose of the same in statutory interpretation, let's examine the liquidator's action in collecting the fees. Is this action eroding or depleting the respondent's assets and properties? Certainly not because such collection is against the purchasers of the units of the condominium. It is again outsiders in that sense and in fact the action of the liquidator do protect the resources of the respondent from unwarranted use. It also cannot in any manner affect the resources of the companies further. The action is based on good reason too, ie, to make possible those who genuinely claimed beneficial ownership of the units could be properly verified.

C

D

**[67]** So although at first blush, the provision might hinder such collection of fees without the approval of the OR, the action of the liquidator upon scrutiny does not actually infringe that provision as it does not go against the purpose and intent of the same.

E

*Whether The OR Is At Liberty Pursuant To s. 229(1) Of The CA To Receive The Complaint Of The Society*

F

**[68]** The OR states that he is at liberty to receive the complaint of the Society pursuant to s. 229(1) of the CA which reads:

> Where in the winding up of a company by the Court a person other than the Official Receiver is the liquidator, the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties, **or if any complaint is made to the Official Receiver by any creditor or contributory in regard thereto**, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient. (emphasis added)

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H

**[69]** The submission of the OR on this point is with respect wrong as the provision indicates clearly the complaint must come from the creditor and contributory. In this regard there is no dispute that the Society is not a creditor or contributory of the respondent. Therefore the argument of the OR that he could receive the complaint of the Society cannot be accepted.

I

*Whether The Liquidator Can Exercise His Discretion In Respect Of The Collection Of Fees*

**[70]** It is also relevant to decide on the issue whether the liquidator is able to use his discretion when the fees are imposed and collected. In this regard s. 237(4) of the CA states:

> Subject to this Part the liquidator shall use his own discretion *in the management of the affairs and property of the company and the distribution of its assets.* (emphasis added)

**[71]** It is clear in the provision stated above, the liquidator is given a discretion to:

(a) manage the affairs and property of the company; and

(b) distribute the assets of the same.

**[72]** As to how these two matters are done is entirely up to the liquidator to decide in view of the discretion given. If the liquidator is not minded to use the assets and properties of the respondent, then he is justified to do so. Likewise he is justified to impose the fees so as not to affect the assets and properties of the respondent.

*Whether The Purchasers Being Imposed The Fees Should Appeal*

**[73]** There is also a need to address the issue whether the purchasers who had complained about the fees should have appealed against the liquidator's decision to impose the same. In this regard the provision of s. 279 of the CA becomes relevant where it states:

> **Any person** aggrieved by any act or decision of the liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.
>
> (emphasis added)

**[74]** I have noted the words 'any persons' in the above provision to mean that those words illustrate the provision is very widely worded to allow for any individual to lodge an appeal if he is not satisfied by the liquidator's decision. In this regard there is no dispute none of the purchasers being imposed the fees had found it fit to appeal.

**[75]** As the legislature has determined it is appropriate there should be a specific procedure to voice dissatisfaction of a liquidator's decision by way of an appeal, the purchasers must without fail file this appeal, which they did not do.

**[76]** The provision and the effort of the legislature in enacting the same would be meaningless if it is not followed. Therefore the purchasers will have to bear the consequence of not appealing and should not be allowed to be heard in respect of the imposition of the fees.

*Whether Part Of The Affidavit Of The Liquidator Concerning The Complaint From The Society And Matters Arising Thereof Should Not Be Taken Into Account And Should Be Struck Off Pursuant To O. 41 r. 6 Of The RC*

**[77]** The OR submits that the affidavit of the liquidator concerning the complaint from the society and matters arising thereof should be struck off pursuant to O. 41 r. 6 of the RC because it does not explain whether the liquidator can imposed such fees as remuneration.

**[78]** I agree with the liquidator's submission that the matters raised in the affidavit are relevant. It relates to facts pertaining to the OR receiving complaint from the Society regarding the imposition of the fees. The receiving of that complaint from the Society is relevant as it relates at least to the issue whether it is a creditor or contributory for it to make a complaint as highlighted in the statutory provisions that I have alluded to. There is no merits to strike out parts of the affidavit of the liquidator as requested as it is relevant to the issue before this court.

*Whether The Liquidator's Affidavit Ought To Be Expunged As It Is Not In Bahasa Malaysia As Required By O. 92 r. 1(1) Of The RC And s. 8 Of National Language Acts 1963/67*

**[79]** O. 92 r. 1(1) of the RC states:

> Subject to paragraph (2), any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order:
>
> > Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

**[80]** While s. 8 of the National Language Acts 1963/67 states:

> All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:
>
> > Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

**[81]** Relying on the above provisions the OR says the liquidator's affidavit should not be considered as it is not in Bahasa Malaysia.

**[82]** First I find the OR has every right to put forth such argument especially when it is provided for statutorily. But I also find in this day and age, such submission borders on triviality. Further I do not think the OR is

placing too much reliance on this argument to negate the importance of deciding the crux of the matter; whether such fees could be collected by the liquidator.

**[83]** Second and more importantly the OR's submission is with respect incorrect on this point. In this regard the citation of O. 92 r. 1(1) of RC by the OR failed to take note of O. 1 r. 2(2) of the RC which states;

> (2) These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

**[84]** The OR's submission on this point is also with respect wrong because by virtue of s. 372(d) of the CA and s. 16 of the Courts of Judicature Act 1964, rules specifically for winding-up of companies can be made as in WUR. Further Jabatan Kehakiman Malaysia, Mahkamah Agung has issued a Circular No 5 of which clarifies that winding-up proceedings may be filed in English until such time as an authoritative Bahasa Malaysia version is gazetted. Two cases quoting the circular are *Scientequip (M) Sdn Bhd v. Properties Review Sdn Bhd* [2006] 3 CLJ 592 and *Citibank Bhd v. Malwira Manufacturing Sdn Bhd* [2012] 3 CLJ 81. Therefore the liquidator's affidavit although in English cannot be struck out because the WUR have been gazetted in English.

**Conclusion**

**[85]** The OR himself found it fit to apply under s. 277 of the CA. I have already explained by virtue of s. 277(2) of the CA itself, I am given the full discretion as I deem fit as to what is to be decided in respect of the OR's applications.

**[86]** I have also explained the basis of the applications of the OR and the counter arguments of the liquidator. I have also addressed the issues which are fundamental for the determination in regard to the applications. For the reasons I have alluded to, the liquidator is at liberty to impose and collect the fees.

**[87]** Based on all the foregoing, the applications of the OR is with respect dismissed with no order as to costs.